Law Quadrangle (formerly Law Quad Notes)

Volume 22 | Number 2 Article 5

Winter 1978

Jury Size and the Pereumptory Challenge

Richard Lempert
University of Michigan Law School

Jury Size & the Peremptory Challenge

Testimony on Jury Reform

by
Richard Lempert
Professor of Law,
University of Michigan

This article was submitted jointly by the author and Dr. Jay Schulman as prepared testimony, supplementing Dr. Schulman's oral testimony of September 22, 1977, to the Senate Judiciary Subcommittee on Improvement of Judicial Machinery. The subcommittee was considering Senate Bill 2074, an omnibus bill which, among other things, would have required all United States District Courts to switch from twelve to six member juries in civil cases and would have decreased the number of available peremptory challenges in civil cases from three to two. Upon completion of the hearings on this bill, these provisions were deleted from the version sent to the full Committee. It should be noted that most District Courts by local rule use six member juries in civil cases. The argument in the text suggests that the Congress might wish to forbid this practice by statute or at least limit it to certain categories of cases.

In this statement we address two issues raised by Senate Bill 2074: the issue of jury size and that of the peremptory challenge. We begin by discussing the ideals of our system of jury justice and the ways in which the operating system necessarily falls short of the ideals.

General Considerations

The ideal jury (*a*) is representative of the people living within the jurisdiction of the court, (*b*) is unbiased, (*c*) decides a case on the basis of the evidence presented, (*d*) evaluates the evidence in the light of the judge's instructions on the law, and (*e*) in appropriate cases mitigates the rigidity of the law by reflecting in its verdict fundamental principles of justice and morality. With the exception of the last point most of those who have written about the jury should agree with this description of the ideal. Point (*e*) causes disagreement because of its obvious inconsistency with points (*c*) and (*d*); if an honest evaluation of the evidence and a good faith application of the law always led to just, moral results, arguments concerning the propriety of what has come to be called jury nullification would not arise. We will not comment on the matter of jury nullification except to note that our system has developed a peculiar compromise in this area—in most jurisdictions jurors have the de facto power to nullify the requirements of the law and evidence (or in civil cases to "season" the requirements of law with its own sense of justice) but they are not told they have it. Instead, we wish to note another tension and the compromises our system uses to cope with it. This is the inherent tension between the ideal of the representative jury and the demand that the jury be unbiased, competent in its evaluation of the evidence, and comprehending in its application of judicial instructions.

Representatives drawn randomly from a community share the biases and prejudices that characterize members of that community. The prejudices may be irrelevant to the matter being litigated, they may be benign, or they may run counter to values that are deeply engrained in our legal system. Common prejudices include the belief that a police officer's word is better than the average citizen's as well as the belief that no police officer can be trusted. They range from the feeling that no tort judgment is excessive because the insurance companies exist to pay claims to the feeling that only a chiseler would seek to collect for pain and suffering. Prejudices color the way in which jurors evaluate evidence, yet often even unprejudiced jurors are likely to be incapable of appreciating the true value of evidence presented. Finally, it is clear that jurors sometimes have difficulty in understanding judicial instructions and applying them to the facts of a case.

Others have noted the tension between the demand that juries be competent, unbiased factfinders and the requirement that juries be representative of the larger community. This observation is typically the empirical linchpin in arguments made by those who, at least in civil cases, would abolish the jury and transfer its factfinding functions to the judge. But those who argue this way make a fundamental mistake. They attribute the jury's deficiencies to the fact that individuals chosen arbitrarily from the community are sometimes uneducated, sometimes uncaring, and typically legally naive. In fact, most of the drawbacks attributed to the democratic nature of the jury have little to do with the representativeness requirement. Instead they are attributable to a simpler, inescapable source: the human condition. People collect biases as they go through life. While they may differ in their ability to disregard them, there is probably no one whose observations will not at some time be affected by his biases. Even if such an individual existed, his evaluation of evidence would still be far from perfect. A substantial body of research now exists demonstrating ways in which people consistently misestimate the implications of information given them.

Judges, alas, are also human. They can no more escape the dangers of biased perception and fallible information processing than the jurors over whom they preside. If judges have an advantage over jurors in their presumed understanding of the law, they are disadvantaged in that their public position subjects them to pressures that may systematically reinforce or create biases. Indeed, judges are at times elected or appointed in part because of the appeal of biases that are ideally irrelevant in the factfinding process. Furthermore, judges typically play an administrative as well as a judicial role. As administrators they are necessarily concerned with the efficient functioning of a judicial bureaucracy. Too often behavior which promotes bureaucratic efficiency is antithetical to our system's ideal of individualized justice. In such matters as criminal sentencing, judicial behavior may be influenced by the legally irrelevant consideration of whether the court's time has been "wasted" by a jury trial. In civil trials some judges reportedly engage in considerable "arm twisting" to promote out-of-court settlements. We note these factors not to condemn judges; they would not be human if they were not at some times influenced by the bureaucratic and other pressures brought to bear on them. But these pressures do mean that there is inherent value in an institution, such as jury trial, that guarantees the insertion of a non-bureaucratic element at a key point in the trial process.

What then is the attitude that the Congress should take toward jury reform? It is not a romantic idealization of the jury; there is no reason to think that the jury today is a perfect factfinder or that it ever will be. But by the same token the jury should not be regarded as an imperfect substitute for a judge, an institution that will necessarily improve as it comes more closely to resemble or be influenced by one exalted individual learned in the law. In particular, the Congress should be skeptical of reforms that merely save money (given that the amount of money expended on jury trials is a pittance compared to our total expenditures on the justice system and this sum is in turn but a minute portion of governmental budgets) and particularly suspicious of reforms whose primary virtue is that they ease the tasks of judges and court administrators. The continued vitality of the Sixth and Seventh Amendments should be accepted as a starting point. This means that jury trial will necessarily be with us in the foreseeable future. The issue is how may the institution be made more effective in promoting the valued goal of fair and accurate factfinding. The starting point for inquiry is with the apparent weaknesses of factfinding by average individuals.

Jury Size

We specified three possible deficiencies in lay factfinding: the biases may influence perceptions, the probative weight of evidence may be distorted, and instructions on the law may be misunderstood. These are all problems that are ameliorated by group decision making. In groups, expressions of bias may be inhibited or properly dismissed as individuals with conflicting points of view call each other to account. Totally apart from bias, group factual judgments tend to be more accurate than those made by individuals. An individual is at all times left to his own devices while a group may receive contributions from many individuals. Where, for example, memory is important as in recalling the testimony of various witnesses, one individual may recall certain facts while another recalls others. Where a problem is inescapably ambiguous, error variance is reduced when individual judgments are averaged together. Where understanding is difficult, as with a judge's instructions, a lone decision maker is lost if he does not understand. A person in a group may benefit from the understanding of others. Groups, in short, are in many ways as strong as their strongest link.

These advantages of group decision making are more pronounced as group size increases, until the point where the contributions of new members are offset by increasing problems of coordination and morale. However, even before the point of negative returns each additional new member is likely to add somewhat less to the quality of group decision making than the person before him. The question facing the Congress is whether differences in the quality of decisions rendered by six and twelve member groups are likely to be so great that the quality of jury justice will be decreased by mandating the smaller number. Our feeling is that this is the case. In clear cases, six and twelve member juries should decide similarly, although the occasional decision against the weight of the evidence will be more common with the smaller group. In close cases, decisions of larger juries should, on the average, be better with respect to such core legal values as unbiased factfinding, thorough consideration of the evidence, and consistency across similar cases.

It can be shown statistically that minority viewpoints are substantially more likely to be represented in (more or less) randomly chosen groups of twelve than in similarly chosen groups of six. The greater heterogeneity of the larger group makes it a setting in which individual prejudices are more likely to cancel out and in which individuals with valuable specialized knowledge or particularly astute insights are more likely to be available. A further advantage enjoyed by

larger juries is that they are more likely to render similar decisions in similar cases. Where individual judgments are averaged, as is often the case in civil litigation despite the official disrepute of quotient verdicts, averages taken across twelve individuals are likely to diverge less than averages taken across six. Even where judgments are not averaged, groups of twelve are more likely to resemble each other than groups of six, in that larger groups more accurately reflect the population from which they are drawn.

In short, both statistical modeling and the existing research on small groups make it clear that proponents of six member juries cannot substantiate the claim that such juries are likely to be better decision makers than juries of twelve. Indeed, even the weaker burden of showing that the switch to smaller juries will not positively harm the quality of jury justice cannot be met. While proponents of larger juries cannot specify precisely the degree to which the decisions of twelve are likely to be better than those of six, a fair reading of the evidence indicates that the advantage generally lies with twelve, perhaps by a considerable margin. Thus, it is our strong recommendation that Congress not interfere with those federal district courts that have been able to resist the bureaucratic siren song of six member juries, choosing to opt for the higher quality of delivered justice likely to be associated with juries of twelve.

Indeed, our preference is a statute requiring all districts to allow litigants the option of a larger jury, at least in cases where substantial amounts of money are at stake or important values clash. The additional expense of larger juries is miniscule relative to the federal budget and slight relative to total judicial expenditures.

Some have asked, "If twelve jurors are better than six why aren't thirteen or fourteen jurors better than twelve?" This question is put forth as if it were a response to the arguments of those who favor the retention of the twelve member jury. It is not responsive. If fourteen jurors in fact perform better than twelve this fact supports rather than undercuts the conclusion that twelve jurors perform better than six. Those who write on jury size rarely address the issue of juries larger than twelve because the debate over jury size is for practical purposes constrained by political reality and today's political reality is that juries are going to be of no more than twelve members. Nonetheless, it is interesting to speculate about the desirability of juries with more than twelve members. Several points can be made. First, we do not know whether juries of sizes thirteen, fourteen, fifteen, or higher might reach decisions of a higher quality than those reached by twelve member juries in some or all cases. Second, the value of additional jurors apparently increases at a decreasing rate. Thus, any increase in the quality of jury decision making that results from going, for example, from twelve jurors to fourteen is not likely to be as great as the increase brought about by going from ten jurors to twelve.

Finally, as we increase jury size much above twelve coordination and/or morale problems are likely to set in which will more than offset the incremental contributions of the new jury members. At what size this occurs, we cannot say. Given the experience with juries in this country, we are reasonably confident that these problems do not cause grave difficulty in juries of twelve.

Peremptory Challenges

A second proposed "reform" is reducing the number of allowed peremptory challenges in civil and criminal cases. Some who argue for fewer peremptory challenges view them as a device by which adroit attorneys can pack juries with those biased in their favor, while others believe that peremptory challenges distort juries by making them less representative of the population from which their members are drawn. While we recognize that attorneys do on occasion eliminate people because of their leadership potential or education rather than because of perceived bias, we nonetheless believe that the first view is largely mistaken. Given the limited number of peremptory challenges, their availability to both sides, and the fact that challenged jurors are replaced at random, the most an attorney can usually do is eliminate those jurors likely to be prejudiced against his or her client. Only in special circumstances, where community views disproportionately favor one party or a case appears hopeless to begin with, can an attorney afford the luxury of eliminating the unbiased.

There is more substance to the claim that the use of peremptory challenge lead to a less representative jury, but this by no means makes the case for reducing the number of peremptory challenges. Although maximizing the degree to which the jury represents the community may have value in itself, few would think this value more important than maximizing the likelihood of fair factfinding. Some viewpoints found in the community should not be represented on juries. An obvious case is the viewpoint of one so closely related to a party that his decision is likely to be colored by that relationship. Another obvious example is the viewpoint of one so convinced before trial that a certain outcome is appropriate that he will resist the influence of the evidence.

The right to challenge jurors is essential because where values clash it is more important to have jurors who can be fair in their judgments than it is to have a jury that mimics the demographic or attitudinal composition of the community. Challenges are devices for eliminating from juries individuals whose prejudices are likely to interfere with their ability to be impartial triers of fact. The group of jurors who survive the challenge process may be less representative of the community from which they are drawn than the original group of unchallenged jurors, but they are more likely to render a judgment fairly responsive to the evidence in the case. The trade-off between representativeness and fairness strengthens rather than weakens the quality of jury justice.

Many individuals accept the above argument in the case of the challenge for cause, but do not believe it applies to the peremptory challenge. Those who make this distinction do not realize how the system of challenging for cause is often administered. While there are circumstances, such as a close family relationship to one of the parties, where a challenge for cause must be allowed, the system is generally one of great judicial discretion. Many judges are reluctant to exclude jurors for cause despite an obvious source of bias if the juror states that his decision will be unaffected by the apparent cause for concern. Appellate courts typically support such lower court decisions. For example, plaintiff's attorney in a suit brought against an insurance company might wish to challenge for cause a juror whose parents were agents for some other insurance company. If the juror states that these family ties will not influence his decision, a challenge for cause will be unavailable in many courts. The decision not to exclude for cause in these circumstances may be justifiable, but it is not justifiable on the ground that the juror can be trusted to disregard the obvious source of bias. A promise to put aside one's biases is inherently suspect because people are often unaware of how their biases affect their judgments. The promise is even more suspect when it is made in a setting where one might be embarrassed to admit that he could not be fair. If the promise is suspect, the quality of jury justice is likely to be enhanced by disregarding disclaimers of prejudice where any likely source of bias is revealed on voir dire.

This alternative, however, has its disquieting aspects. People rarely ask to serve on juries and they surely do not ask to be publicly questioned in ways that cast doubt on their integrity. To dismiss for cause a juror who has asserted his capacity for separating judgment from prejudices may be perceived by the one dismissed and by others as degrading or insulting. We should be reluctant to add this kind of burden to the other burdens of jury service. Furthermore, the likelihood that a person will be influenced by apparent sources of prejudice will not always be as clear as in the example of the preceding paragraph. Judicial intuitions about when an asserted capacity for unbiased judgment should override suspicions of bias almost surely will vary from judge to judge and individual judges might well be inconsistent over time. One situation poses almost insoluble difficulties for a system which relies on the challenge for cause to eliminate individuals whose prejudices would interfere with fair jury factfinding. This is where a suspicion of bias is engendered not by some particular feature of the juror's biography or by some specific prejudice, but rather by a set of diffuse attitudes that characterize the juror's outlook on life. An individual low in tolerance of ambiguity and high in deference toward authority might be likely to approach a criminal defendant with a presumption of guilt rather than innocence. Yet we can hardly expect a judge to attend to all the character traits that might predict to biased judgments. We have even less reason to expect an appellate court to declare that they do predict as a matter of law.

If we relied on judges to exclude for cause all individuals likely to be incapable of fair judgment and if current practice is a guide, the error of failing to strike biased jurors would be more common than the error of striking the unbiased, but both should occur. The latter error should never be grounds for appeal since the struck juror would, in theory, be replaced by one equally unbiased. The former error, being defined by psychological rather than legal theory, would be very difficult for appellate courts to handle. Hence, trial judges would be likely to be given considerable discretion which, in practice, would be largely unreviewable. Thus, attempts to eliminate juror bias by an expanded conception of what constitutes grounds for challenge might lead to a system which was in practice only slightly more effective than the current one.

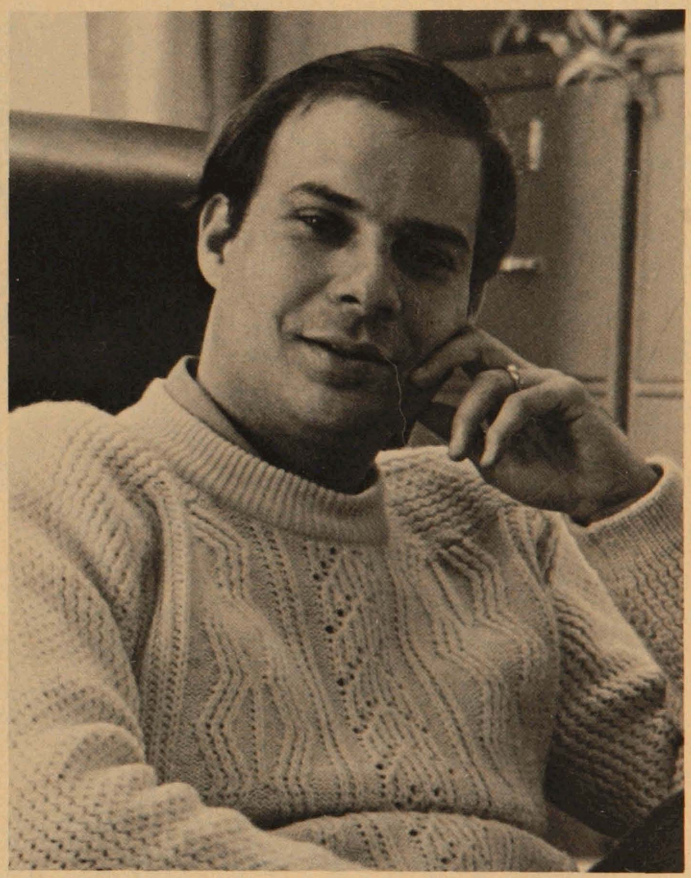
The availability of peremptory challenges minimizes tensions inherent in our system of challenges for cause. The primary virtue of the peremptory challenge is as a device

for eliminating from the jury individuals whose capacity for impartial judgment is suspect, but not so much so as to require their exclusion as a matter of law. The peremptory challenge has the further virtue of saving face for jurors who have asserted a doubtful capacity to decide in an unbiased fashion since these assertions are never rejected by the court in the way that they would be if a challenge for cause was sustained. Mistakes, no doubt, continue to be made, but they are the mistakes of the parties who suffer from them and not the mistakes of the court. Finally, the availability of peremptory challenges allow the courts to take what is, psychologically speaking, an unduly restrictive view of when potential jurors are likely to be impermissibly biased without endangering the quality of jury justice as substantially as would be if prejudiced jurors not challengeable for cause could not be removed peremptorily. By limiting the situations in which challenges for cause must be granted, appellate courts minimize the chance of reversible error during the jury selection process.

There is no ideal number of peremptory challenges. Their availability would vary with incidence of potentially biasing attitudes in the jury population. Generally speaking, people's biases are more likely to be activated in criminal than in civil matters and these biases are more likely to favor the prosecution than the defense. This justifies the decision to grant more peremptory challenges in criminal cases than in civil actions and it would also justify a decision to grant criminal defendants more peremptory challenges than prosecutors. While the number of available peremptory challenges may be made to turn on whether an action is criminal or civil, it is impossible to specify in advance appropriate numbers of peremptory challenges for different types of civil litigation.

Assuming some number is fixed for civil litigation, flexibility may be achieved by judicial administration of the challenge for cause or by judicial discretion to increase the number of peremptory challenges available to one or both parties. Where an action is likely to evoke popular prejudices, the judge should be more willing to allow challenges for cause despite disclaimers of bias than when an action appears less emotionally charged. If popular prejudice is directed largely against one side, that side should have the easier time in excluding jurors for cause or should be allowed extra peremptory challenges. If one party is to be awarded extra peremptory challenges, that party should bear a substantial burden of showing that prejudicial public opinion is widespread and deeply held. Whatever the judge's discretion with respect to challenges, the number of peremptory challenges should be sufficient to allow for the judge who is unduly rigid in his attitude toward for-cause challenges. It should allow room to challenge individuals whose attitudes suggest bias even though their biographies or acknowledged prejudices do not, and it should take into account the fact that individuals often have general biases regarding the kinds of people and organizations who are parties to typical civil actions. At the same time, it should not be so large as to allow an attorney too many opportunities to eliminate those who are likely to be unfavorable by reason of their abilities to rationally evaluate evidence rather than because of bias.

While we cannot specify an appropriate number of peremptory challenges in civil litigation, we feel strongly that with twelve member juries three peremptory challenges are likely to be inadequate in many cases. Cutting the number of available challenges to two would be most unfortunate. Whatever the number allowed, we believe the parties should have the option of increasing the number of available peremptories by mutual agreement.



Richard Lempert

This statement offers no substantiation for the many empirical propositions that lie at the root of it. For substantiation of the argument with respect to jury size see: Richard Lempert, "Uncovering Nondiscernible Differences: Empirical Research and The Jury Size Cases," 73 *Mich. L. Rev.* 643 (1975) and the studies cited therein. For substantiation of the points regarding peremptory challenges see: Barbara Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 *Stan. L. Rev.* 545 (1975); Note, Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges, 27 *Stan. L. Rev.* 1493 (1975); Dale Broeder, Voir Dire Examinations: An Empirical Study, 38 *S. Cal. L. Rev.* 503 (1965); and Virginia R. Boehm, Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to The Problem of Jury Bias, 1968 *Wis. L. Rev.* 734.